No. 473



IN THE

# Supreme Court of the United States

October Term, 1947.

STANLEY W. ROOT, WILLIAM J. EASTWOOD and NORMAN KLAUDER, Trustees of STANLEY ENGINEERING CORP., Bankrupt,

and

GABY COMPANY, *Petitioners*,

vs.

MORRIS GALMAN.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Stanley W. Root, William J. Eastwood and Norman Klauder, Trustees of Stanley Engineering Corp., Bankrupt, and Gaby Company, pray that a writ of certiorari issue to review the judgment of the United States

Circuit Court of Appeals for the Third Circuit entered November 6, 1947, reversing the order of the District Court of the United States for the Eastern District of Pennsylvania entered May 13, 1947.

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## OPINION BELOW.

The Opinion of the Circuit Court of Appeals is not reported. The Trial Court rendered no opinion.

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## BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Statutes 938.

The judgment of the Circuit Court of Appeals for the Third Circuit was filed November 6, 1947, and the mandate was stayed for 30 days from November 21st, 1947.

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## QUESTIONS PRESENTED.

1. Has a Judge of the District Court abused his legal discretion in refusing to confirm a bankruptcy sale of real estate where such real estate is sold discharged of encumbrance liens, and,

(a) The bid is not sufficient in amount to pay such encumbrances, liens, interest and accrued taxes, and,

(b) Where another bidder at the time of confirmation offers to pay $10,000.00 more than the bidder at sale, and

(c) Where the original bidder raises his bid in the Court but does not bid as high as the increased amount of the second bidder.

2. Where the District Court refuses to confirm a bid at auction sale because of a substantially increased bid, should the Circuit Court direct the court to confirm to the first bidder at the price originally bid and less than his increased offer, or should the Court direct a resale at public auction where the highest bidder is willing to put up a bond to guarantee that he will bid at least the amount of his higher bid and pay the costs of such resale?

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## SUMMARY STATEMENT.

Stanley Engineering Corporation is in bankruptcy under Chapter 10 of the Bankruptcy Act.. April 8, 1947 the bankruptcy court authorized the sale of assets. The real estate involved was appraised, for liquidation purposes, at $50,000,00. The Court had theretofore, pursuant to a petition of the Trustee, authorized the sale of this real estate discharged of liens so that the mortgagee and all other lien holders were relegated to the proceeds of the sale.

The unpaid principal of mortgage is $52,900.00 with accrued interest thereon at six percent from May 2, 1946 and with the 1947 taxes in the amount of $1293.75 and an insurance bill for over $1531.00.

At such sale Morris Galman made the highest bid of $57,250.00. Arithmetical calculations would indicate that the Trustees would get nothing out of such real estate sale. The amount would be consumed by the mortgage, accrued interest and taxes and other liens and charges.

On the following day at a hearing in the District Court on confirmation, the Gaby Company offered $63,250.00. District Judge Welsh continued the hearing to consult with his colleagues on the bench.

At such continued hearing, Galman agreed to match the latter's bid. Gaby then raised its bid to $67,250.00, $10,000.00 more than was bid at the auction and Galman refused to go that high.

Gaby had expressed its willingness to accept Judge Welsh's suggestion to enter a bond to insure the renewal of its bid at a new public sale, plus the expenses of advertising and incidental costs.

The District Court refused to confirm the Galman bid of $57,250.00, and when all present desired the matter to be concluded without a resale, directed the Trustees to make the sale to Gaby at its offer of $67,250.00.

On Galman's appeal to the Circuit Court of Appeals the matter was twice argued before the Judges of the Circuit Court. The majority decided that the District Court should confirm the sale to Galman at his original bid of $57,250.00. The two dissenting Judges agreed that the decree of the District Court directing the sale to be made to Gaby be reversed but stated that there should be a public resale of the property, the Gaby Company to file its bond guaranteeing that it would renew its bid of $67,250.00 and pay the auctioneer's costs of such resale.

## REASONS FOR GRANTING THE WRIT.

I. The Judgment of the Circuit Court reduces the function of a U. S. District Court Judge in the exercise of his judicial discretion in refusing to confirm a bid for gross inadequacy to the performance of a ministerial act.

II. The exercise of a judicial discretion is properly exercised and should be upheld where confirmation is withheld from a bid at a bankrupt sale which would result only in paying an encumbrance holder his lien in the face of a substantially increased bid which would result in dividends to the U. S. government or to general creditors.

III. The proper administration of bankrupt estates requires the Court to order a public resale where confirmation of a sale is refused because of gross inadequacy conditioned upon the offeror executing a bond to bid the higher amount at such resale.

IV. The Circuit Court dissenting opinion states the established rule of procedure followed in sales of bankruptcy assets, where confirmation is denied in the District Court.

V. It is of the utmost importance that, in the absence of unusual circumstances, a uniform recognized procedure governing sales of bankruptcy assets be established, to the end that the paramount interest of creditors be conserved and the integrity of the judicial function be upheld.

VI. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of Reed v. King, 157 F. 2d 868, decided November 11, 1946.

## BRIEF OF ARGUMENT.

The Summary statement demonstrates that the District Court refused to confirm the sale because of the gross disparity between the highest auction bid and the price offered at the confirmation hearing. The well established principle of law applicable may be stated as follows:

### I. THE DISTRICT COURT PROPERLY EXERCISED ITS JUDICIAL DISCRETION IN REFUSING TO CONFIRM THE SALE WHICH WOULD GIVE NOTHING TO CREDITORS IN THE FACE OF A BID WHICH WOULD GIVE CREDITORS TEN THOUSAND ($10,000) DOLLARS.

In VOL. IV, COLLIER ON BANKRUPTCY, page 1579, the principle is stated:

> "A grant or denial of confirmation or approval is, in a measure, the determination of a legal issue, since it involves an examination of the preliminaries to, and the conduct of, the sale. Yet it is also and possibly to a larger extent, a matter of business administration and practical management. * * * This element of business expediency necessarily determines the margin of judicial discretion, when deciding whether or not a sale should be confirmed."

In JACOBSOHN v. LARKEY, 245 Fed. 538, the rule was stated as follows:

> "When a trial tribunal orders a judicial sale subject to its confirmation under authority expressly requiring of it the exercise of discretion in approving or setting

aside the sale (Bankruptcy Act Sec. 70b) an appellate tribunal will not reverse its discretion by substituting its own nor will it otherwise disturb or interfere with its exercise, as long as it does not amount to an abuse of discretion."

In IN RE BURR MFG. AND SUPPLY CO., 217 Fed. 16, the case relied upon by the respondent in the argument before the Circuit Court, the court stated the principle as follows:

"The high bidders, however, have a standing which permits them to appear and urge the acceptance of their bids and the confirmation of the sale. They were brought to the sale by invitation of the court having done what the court asked them to do, they now have a right to ask the court to approve their acts. * * *

While such are the rights of successful bidders and while the policy of the law favors them as against lower bidders who attempt to overthrow them, *their rights, however, are not superior to the rights of creditors not to be deprived of their security at prices which are grossly inadequate. Therefore, the issue in this case is not between the low and the high bidders but is between the high bidders and creditors * * * parties with equal standing.* * *.*"

## II. JUDICIAL DISCRETION EXERCISED IN REFUSING TO CONFIRM A BID BECAUSE OF A GROSS INADEQUACY SHOULD NOT BE REDUCED TO A MERE MINISTERIAL FUNCTION.

Here the District Court refused to confirm a sale at a bid of $57,250.00, and directed the acceptance of the bid of $67,250.00. The Circuit Court reversed the order directing the trustees to accept the bid of $57,250.00. While this part of the ruling may be open to question, when the Cir-

cuit Court requires the District Court to confirm the sale for $57,250.00 the Circuit Court relegates to itself the authority initially vested in the District Court. Surely such judicial discretion in that court cannot be reduced to a mere ministerial function.

In JACOBSOHN v. LARKEY, 245 Fed. 538, the Circuit Court laid down this rule:

> "When in a given case a price is grossly inadequate and when upon that ground confirmation should be refused, are matters within the judgment and discretion of the tribunal ordering the sale. When a trial tribunal orders a judicial sale subject to its confirmation under authority expressly requiring of it the exercise of discretion in approving or setting aside the sale (Bankruptcy Act, Section 70b), an appellate tribunal will not reverse its discretion by substituting its own, nor will it otherwise disturb or interfere with its exercise so long as it does not amount to an abuse of discretion. In re Shea 126 Fed. 153."

To the same effect is AMERICAN TRADING AND PRODUCTION CORPORATION v. CONNOR, 109 F. 2d 71.

Thus in SHIPE v. CONSUMER SERVICE CO., 29 F. 2d 321, cert. den. sub. nom. TUDOR v. SCHINDLER, 279 U. S. 850 (1929), the court made the following statement:

> "But when, as here, the advance offered before confirmation is nearly twenty per cent of the price bid, we could not say that the court's discretion was abused in making it possible again to offer the property at this increased upset price. * * *"

Of course, there is a distinction in the principle of law, which must be carefully noted, between the cases where an application is made to set aside a confirmation already made from those cases where a confirmation is denied.

In 4 COLLIER ON BANKRUPTCY, 14th Ed. Sec. 70.98, at pages 1584-86, this distinction is stated as follows:

"This represents a compromise between the policy of strengthening public confidence in the stability of judicial sales and that of strengthening the court's hand in its efforts to secure the *best possible result for the benefit of the estate under its protection. But when the court is faced with a request to set aside a sale and to undo what has already been done with the court's approval,* the balance turns in favor of the policy of strengthening public confidence in judicial sales and executed contracts, and, as we have seen, the sale will be set aside only if the grounds alleged are sufficient to invalidate a similar private transaction on equitable grounds."

In REID v. KING, 157 Fed. (2) 868, the trustee received a bid at the sale of $11.10 and $10.55 respectively per share for stock appraised at $10.00 per share. Before confirmation a new bidder offered $15.00 per share and the District Court refused to confirm the lower offer and ordered the higher bid be accepted. On appeal to the Circuit Court, the latter stated, page 869:

"There is involved the question whether the Court had the right to exercise its discretion in the premises notwithstanding the fact that the price originally offered was found not to be grossly inadequate."

* * * * * * * *

"The rule has been taken over by courts of bankruptcy under a statute whose *prime purpose is to dispose of the assets of the bankrupt at the highest prices obtainable in the interest of the creditors;* and not infrequently the conflict between this purpose and the need to inspire confidence in sales under the supervision of the court has given rise to uncertainties which are reflected in the decisions. *The courts have not always borne in mind the important distinction between setting aside a completed sale and refusing confirmation of a sale which has been made subject to the approval*

*of the court.* Morrison v. Burnette, 8 Cir., 154 F. 617, 624; In re Burr Mfg. & Supply Co., 2 Cir., 217 F. 16, 19; and the importance of a substantial offer at an advanced price after a sale has taken place, but before it has been confirmed, has not always been recognized. For example, in Sturgiss v. Corbin, 4 Cir., 141 F. 1, the alleged inadequacy was so slight that the court would have been justified in confirming the sale without reference to the gross inadequacy rule.

The result is that some inconsistency is found in the statement of the rule in reported cases and the courts in notable instances have departed from strict adherence to the rule and have refused confirmation in the interests of the creditors, even in the absence of unfairness or impropriety in the conduct of the sale, *when the trustee has received a reliable and substantial advance bid after the sale has been held.* In these cases the courts have accepted such an advance bid as sufficient without the accompaniment of those 'slight circumstances of unfairness' which in the earlier cases, such as Morrison v. Burnette and In re Burr Mfg. & Supply Co., supra, were thought necessary to justify a rejection of confirmation.

* * * * * * * *

*The case before us does not relate to the setting aside of a completed sale but to the confirmation of a sale made subject to the court's approval. The concrete problem is whether or not the bidding should be reopened to let in a substantially higher bid. We see no reason why the court in this situation should not be permitted to exercise the authority granted it by the express terms of the statute to approve or disapprove the lower bid; or why the review of its decision on the point should not be limited by the rule which commits such decisions to the sound discretion of the court. In re Hagerstown Silk Co.,* 4 Cir., 69 Fed. 2d 790; *In re Wolke Lead Batteries Co.,* 6 Cir., 294 Fed. 509; *In re*

*Shea*, 1 Cir., 126 F. 153. *This course, in our judgment, will produce more satisfactory results than a strict adherence to a verbal rule of thumb devised long ago to govern sales in another field.*" (Emphasis ours.)

The PEWABIC MINING CO. v. MASON case, 145 U. S. 349, falls in the category of cases where a request is made to set aside a sale already confirmed—not one seeking confirmation. Nor was this a sale in the course of the administration of bankruptcy assets, where such administration seeks to secure the highest return for the creditors.

Even in a case where the Circuit Court affirmed the District Court in refusing to set aside *a sale already confirmed*, it stated it would have done so if the allegation of an increased offer of $10,000.00 could have been substantiated. KIMMEL v. CROCKER, 72 F. 2d 599. Said the Court in its opinion:

> "*If the record substantiated the assertions of the briefs and argument, quite a different case would be presented. It would clearly be an abuse of discretion to accept the lesser of two comparable bids.* In re Williams, C. C. A. 4, 197 F. 1. Bankruptcy courts should not administer properties encumbered by undisputed liens, unless there is a reasonable probability of there being a surplus over the encumbrances for the unsecured creditors. Bushong v. Theard (C. C. A. 5) 35 F. (2d) 690; In re National Grain Corp. (C. C. A. 2) 9 F. (2d) 802; In re Gimbel (C. C. A. 5) 294 F. 883; In re Harralson (C. C. A. 8) 179 F. 490; 29 L. R. A. (N. S.) 737; In re Goldsmith (D. C. Tex.) 118 F. 763, 767; Dugan v. Logan, 229 Ky. 5, 16 S. W. (2d) 763, cert. den. 280 U. S. 587, 50 Sup. Ct. 36, 74 L. Ed. 636; Remington on Bankruptcy, Sec. 2583. * * * Where there appears to be a substantial equity for the creditors, a bankruptcy court may sell free of liens, in order to realize on the equity; but it should not do so simply to accommodate the mortgagee."

At this time we think it pertinent to note that the appraisal of the real estate stated in the opinion of the Circuit Court as $50,000, is not such an appraisal as has ever been held to equal the "fair value" of the property.

Real estate value for tax purposes is one thing. Depending on its location, for tax purposes, it may be assessed at 80% of its fair value, or 50% of its fair value, or in some instances, 100% of its fair value. Therefore, without more, the assessment for tax purposes is no indication of its value.

Nor can any great weight be placed on the value placed upon it by the appraisers appointed by the Court. These persons appraised it at $50,000.00, "for liquidation purposes." The standard of value fixed as between a "willing buyer and a willing seller" does not exist in this case. The only real indication of its value may be judged from these circumstances—the mortgage encumbrances, accrued interest, and fixed charges amount to $57,250.00, the amount of Galman's bid. Gaby raised the offer to $63,250.00 and Galman raised its bid to $63,250.00. Gaby then bid $67,-250.00, and Galman fell by the wayside. This is evidential of its real value, sustained by Gaby's offer to rebid this amount on a resale which offer is guaranteed by a bond.

Furthermore, the District Court recognized that in the administration of bankruptcy proceedings it is the duty of all concerned in the administration to see that the assets realize the highest amount so that the creditors' interests, which are uppermost, should be adequately taken care of. It is our contention that the creditors' interests are far superior to the interest of a bidder at a sale. Any District Court Judge who would refuse to accept a bid which is substantially higher would be regarded as abusing the judicial discretion vested in him to an extent that the uninformed layman would express skepticism of such Court action.

We urge that it is a far greater obligation on a District Judge to accept a substantially higher bid than it is to subscribe to a doctrine of aiding bidders at public sales.

## III. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS ERRONEOUS IN REVERSING AND ORDERING THE ACCEPTANCE OF THE ORIGINAL BIDDERS LOWER BID, INSTEAD OF ORDERING A RESALE ON CONDITION ASSURING THE HIGHER BID.

The majority opinion of the Circuit Court makes this statement:

> "Rather than condone appellee's failure to bid at the proper place and time, it was incumbent upon the court below, in view of the circumstances, to follow the instructions contained in Jacobsohn v. Larkey, supra, at page 543:
>
> 'Having found gross inadequacy of the price bid at the first sale, the court might validly set aside that sale on that ground *and at the same time make an order for a second sale conditioned upon terms* that would secure to the estate whatever advantage it derived from the bids at the first sale.' (Emphasis supplied.)
>
> Cf. Bovay v. Townsend, supra, in which the court, discussing a judicial sale, said (page 346):
>
> 'We are of opinion that the sole power of the court lay in either approving and confirming the sale or in setting it aside *and ordering another sale upon proper statutory notice.*' (Emphasis supplied.)"

It will be noticed that the majority opinion recognizes the practice to be followed where the District Court refused to confirm a sale because a substantially higher bid is made. Judge Welsh likewise recognized this rule when he stated that he was inclined to order a resale, and inquired whether Gaby would pay the costs of such resale and file a bond to guarantee its higher bid at the resale. To all of

which Gaby agreed, and suggested a bond of $25,000.00 which was acceptable.

It was only when every one present wanted to have the matter finally disposed of before him at this continued hearing that Judge Welsh ordered the Trustees to sell to Gaby.

It is therefore submitted that the Circuit Court of Appeals should have directed a resale of this property. The dissenting opinion very concisely states:

> "I believe, therefore, that the bankruptcy court, having exercised its discretionary power to withhold confirmation, was obliged to order a resale of the property in question, at which all interested would have the opportunity to bid, in accordance with the procedure set forth in the quotations from the *Pewabic Mining Co.*, *Jacobsohn*, and *Bovay* cases contained in the concluding paragraphs of the majority opinion."

It is urged that this is the proper procedure to be adopted in all these cases where the Lower Court refuses to confirm a bid because of a substantially increased offer. Both the majority and the minority opinions recognize this as the proper procedure. We believe that this procedure should have been directed by the Circuit Court of Appeals.

## CONCLUSION.

We submit, therefore, that this Court should definitely settle an important rule of practice and procedure in the administration of bankrupt estates; that the confusion running throughout the cases between the rules applicable in judicial sales other than bankruptcy sales, and those obtaining in sales under the Chandler Act, should be set at rest so that they do not apply in the administration of bankruptcy estates. That the rules of law existing between confirmed sales and sales asking for confirmation be concisely

stated and established, and finally, that the discretion of the District Judge be not taken away solely upon the basis of a mathematical equation.

Respectfully submitted,

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